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No. 87-1150

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*,
Petitioners,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF THE PETITIONERS

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MOTION OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. FOR LEAVE TO FILE A BRIEF IN SUPPORT OF PETITIONERS

The Lawyers' Committee for Civil Rights Under Law and the NAACP Legal Defense and Educational Fund, Inc. (*Amici*) respectfully move for leave to file the attached Brief as *Amici Curiae*. This motion is being filed under Rule 36.1.[1] Petitioners and Respondent The United States of America have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court. Respondents Marvin K. Hammon, *et al.*, have not consented.

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[1] The brief is timely filed under Rule 36.1 since it has been submitted within the time allowed for filing the brief in opposition to the Petition for Writ of Certiorari.

Amici are civil rights organizations representing members of a variety of disadvantaged groups to secure their civil and constitutional rights. Many of the employment discrimination problems which *amici* have attempted to resolve could have been cured without jurdicial intervention if the employers involved had implemented reasonable affirmative action plans, such as the plan at issue in this matter. *Amici* and their clients have a direct interest in securing a rule of law encouraging employers throughout the nation to resolve their own problems through voluntary remedies so that resort to litigation will be unnecessary.

This case involves a question which continues to trouble lower federal courts and employers nationwide, namely, what circumstances will support an employer's voluntary efforts to remedy discrimination. The decision by the court of appeals, which prevents the Petitioners from correcting the present discriminatory impact of an invalid test, conflicts with instructions from this Court designed to encourage voluntary remedies for discrimination while protecting employers from otherwise inevitable litigation, either from minorities or from non-minorities alleging reverse discrimination. The results of the decsion below conflict with those of other federal courts, while threatening to increase the need for court-ordered remedies for discrimination. The resolution of this case will significantly affect the employment practices of public and private employers nationwide, and not just those of the parties to the litigation below.

Amici have represented a large number of discrimination plaintiffs in the District of Columbia and nationwide, and are thus able to present factual information and legal analysis that will demonstrate the larger importance and far-reaching consequences of the decision issued in this case. *Amici* were granted leave to appear as *amici* below, and at the invitation of the district court

participated in the briefing and argument of many of the key issues below.

For these reasons, leave to file the attached *amici curiae* brief should be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether an employer may voluntarily follow a temporary affirmative action plan in order to avoid illegal discrimination caused by a non-job-related selection system which disproportionately limits job opportunities for minorities.

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BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICI

The Lawyers' Committee for Civil Rights Under Law is a nationwide civil rights organization with local offices in Washington, Philadelphia, Boston, Chicago, Jackson, Denver, Los Angeles, and San Francisco. It was formed by leaders of the American Bar in 1963, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights. Over the years, the national office of the Lawyers' Committee and its local offices have represented the interests of blacks, Hispanics, and women in many hundreds of class actions in the fields of employment discrimination, voting rights, equalization of municipal services, and school de-

segregation. Well over a thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association, and other leading lawyers, have assisted in these efforts.

The NAACP Legal Defense and Educational Fund, Inc. is a nonprofit corporation whose principal purpose is to secure the civil and constitutional rights of minorities through litigation and education. For more than forty years, its attorneys have represented plaintiffs in thousands of civil rights cases, including many significant cases before this Court.

Many of the employment discrimination cases brought by *amici* are against employers who could have cured their problems without judicial intervention if they had developed and implemented reasonable affirmative action plans such as the plan at issue in the case at bar. *Amici* and their clients have a direct interest in securing a rule of law encouraging employers to address and resolve their own problems, so that the filing of enforcement lawsuits will be unnecessary.

Amici were granted leave to appear as *amici* below, and at the invitation of the district court participated in the briefing and argument on many of the key issues below.

SUMMARY OF ARGUMENT

The decisions below have failed to recognize that the affirmative action plan (AAP) of the District of Columbia Fire Department (DCFD), far from being an abstract quota program developed in a vacuum, is a measured and reasonable response to avoid immediate liability arising from an invalid test with an unlawful discriminatory impact on blacks which would otherwise occur. The examination's disparate impact and lack of validity are a matter of record and have been stipulated to by the parties to the litigation. By overlooking this critical feature of the DCFD Plan, the court of appeals has not only mis-

applied the rulings of this Court, but would force the DCFD to choose between liability to minorities for discrimination or not hiring firefighters until a valid selection procedure can be developed. Adjusting for the admitted disparate impact of the DCFD's hiring test was entirely overlooked as the basis for justifying the DCFD's Plan.

The court of appeals so focused on its assessment of past discrimination that it overlooked the AAP's critical function of avoiding present discrimination. In so doing, the court of appeals created a situation in which other employers are prevented from taking appropriate steps to prevent present liability. This result contradicts the directions of the Justice Department's own Uniform Guidelines On Employee Selection Procedures, *see* 28 CFR § 50.14 (1987), and results reached by other federal courts. Because of the importance of this issue, the devastating effect the court of appeals' decision will have on voluntary remedies to avoid discrimination, and the conflict with the results of other federal court decisions and federal guidelines, the Petition for Certiorari should be granted.

ARGUMENT

I. THIS CASE PRESENTS QUESTIONS AND CONFLICTS WHICH ARE OF NATIONAL IMPORTANCE

A. The Dilemma Which the DCFD Sought to Resolve Through Its AAP Continues to Perplex Lower Federal Courts and Employers Nationwide

To appreciate the difficulty that the decisions below pose for other employers faced with similar problems of validation, this Court need consider only a few critical facts. As a matter of record, it is undisputed that the DCFD's hiring examination (the Firefighters Selection Test or FST) has an adverse discriminatory impact on blacks. The parties to this litigation have stipulated to

this disparate impact.[1] Even before initiation of this litigation, a hearing examiner for the District of Columbia's Office of Human Rights (OHR) found that the 1980 version of the FST and the virtually identical 1984 version both had severe adverse impacts on blacks without being job-related. Petition at 6, n.3. These findings, made after fifty days of trial, were affirmed on administrative appeal. All of the parties to the present litigation, including the Justice Department, stipulated to these findings.[2] The trial court below once again found that selecting job applicants in order of their ranked FST scores resulted in an adverse racial impact. *Hammon v. Barry*, 606 F. Supp. 1082, 1088 (D.D.C. 1985); Petitioner's Appendix (P. App.) at 134-35a. What this means is that rank-ordered hiring causes black applicants to wait far longer than whites before they receive offers, even though the rank-ordering system is not a valid predictor of job performance. As explained by *amici* during oral argument before the trial court, twenty-nine percent of the DCFD's white hires were employed within a year of the 1980 test. Within that same period, only one percent of the black hires were employed. Of those applicants forced to wait two or three years before employment, only twenty-five percent were white while forty-eight percent, nearly twice the percentage, were black.[3]

To correct the FST's ongoing adverse impact, the DCFD made a reasonable attempt to eliminate this discrimination, and consequent exposure to liability under Title VII, through its AAP. Indeed, all of the parties,

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[1] Statement of Stipulated Material Facts, *Hammon v. Barry*, Nos. 84-0903, 85-0782, 85-0797 (D.D.C.) at ¶¶ 17, 20, and 22. The pertinent pages of this Statement are included in the Appendix to this Brief (App.) at 1a-4a.

[2] *Id.* at ¶ 18, App. at 2a.

[3] March 23, 1985 Hearing Transcript at 103-106. Pertinent pages from this Transcript have been appended to this Brief. App at 5a-8a.

including Respondent The United States of America, stipulated that the portions of the AAP directed towards hiring were "designed *solely* to eliminate the racial and sexual disparity which would exist if the examination results were used in rank order." [4] At issue here is the intractable dilemma which the DCFD now faces without this plan. The FST remains the DCFD's only currently available hiring examination, and the District of Columbia needs additional firefighters now.[5] *See* Petition at 19-21 (emphasizing the current lack of any alternatives to the FST). Since the District has not been able to hire firefighters through random selection,[6] it has employed them according to their rank order based on FST scores. Yet rank-ordered selection is the primary cause of the FST's severely adverse racial impact. Since blacks receive generally lower FST scores than whites, black applicants have been precluded from employment entirely or have faced years of delay before the DCFD could hire them, even though the FST itself has no demonstrated relevance for job performance.

The AAP was adopted to adjust for and eliminate precisely these harsh discriminatory consequences from selecting applicants by rank order from the FST. Without the AAP, the DCFD confronts an unenviable choice. It may address the urgent need for additional firefighters on the basis of rank-ordered selection and confront liability to minority applicants, or it may adopt the equally unsatisfactory alternative of not hiring at all, regardless of safety or other concerns, until a valid alternative to the FST can be developed. For all of those affected by

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[4] Statement of Stipulated Material Facts, ¶ 30, App. at 3a (emphasis added).

[5] For an account of the increasingly urgent need for hiring more firefighters, and the costs of not being able to do so, see Washington Post, Feb. 26, 1988, at C1.

[6] *See, e.g.*, Pub. L. No. 97-91, 95 Stat. 1182 (Dec. 4, 1981); Pub. L. No. 98-473, 98 Stat. 1837 (Oct. 12, 1984) (enacting H.R. 5899); Petition at 20, 20 n.9.

this dilemma, including minority as well as nonminority applicants and the DCFD itself, the most reasonable solution continues to be use of the AAP, which directs that new classes of firefighters contain the same percentage of minorities as the approximate percentage of minorities who pass the FST.

Once they acknowledge or become liable for the adverse impact of a hiring procedure, employers like the DCFD have frequently urged federal courts to create or approve temporary affirmative action measures until alternative procedures can be developed.[7] Indeed, in at least one instance, an employer and a predominately white union preferred to neutralize the adverse impact of a test and retain it permanently.[8] Because courts and employers continue to be vexed by the need to respond effectively to hiring procedures that have an adverse impact on disadvantaged groups, the present case warrants review by this Court.

B. By Adopting Inapplicable Standards and Requiring a Factual Predicate Unrelated to the Invalid Hiring Test, the Court of Appeals Has Departed from Other Federal Authorities and Has Exacerbated a Dilemma Which Merits Review By This Court

Despite the DCFD's need to remedy the adverse effects of the FST or face continued charges of discrimination, the court below struck down the AAP. By so doing, on the grounds that the DCFD lacked the appropriate factual predicate for affirmative action,[9] the court below has undermined the ability of public or private employers to voluntarily avoid imminent racial discrimination.

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[7] *See generally* Schnapper, *The Varieties of Numerical Remedies*, 39 Stan. L. Rev. 851, 889 (1987); *infra* cases cited at 11, note 24.

[8] *Vulcan Soc'y v. Fire Dep't of White Plains*, 505 F. Supp. 955, 960-61 (S.D.N.Y. 1981).

[9] *Hammon v. Barry*, 826 F.2d 73, 78-81 (D.C. Cir. 1987); P. App. at 90a-92a; 813 F.2d at 426, P. App. at 31a.

Over dissent, the majority below first ruled that to comply with the requirements of Title VII, the AAP must respond to a "manifest racial imbalance" in the DCFD's workforce, despite the record and the trial court's findings that the FST had a disparate impact. The court below then managed to find that such an imbalance did not exist. *Amici* concur with Petitioners that such a "finding" by the court of appeals is riddled with errors of law for the reasons the Petitioners have addressed, including improper statistical comparisons, confusion of the standards required by Title VII and the Constitution, reversal of the appropriate burdens of proof, and most disturbing of all, the appellate court's unwarranted assumption of the trial court's role as finder of fact, resulting in conclusions unsupported by any record evidence.[10]

Yet the heart of the error below, and the source of this case's fundamental importance, is that any analysis for "manifest imbalance" within the DCFD's workforce was unnecessary.[11] Indeed, the facts of this case supporting the AAP are far more compelling than a "manifest imbalance" test. The AAP was needed not just to adjust for an imbalance, but to avoid imminent discrimination.

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[10] For example, the majority below regarded observations that the AAP adopted quotas merely to reflect the racial composition of applicants passing the test as "drawn out of the ether." 826 F.2d at 79 n.11, P. App. at 93a. Had the majority considered stipulations to this effect made by all of the parties before the trial court, however, the source and binding effect for these observations would have been clear. *See* Statement of Stipulated Material Facts, ¶¶ 24, 30, 32; App. at 3a-4a.

[11] Even if such analysis were necessary, the proper statistical comparison would reveal a manifest imbalance. The proper comparison is not that adopted by the court below, comparing the DCFD's workforce with the labor force of the entire Washington Metropolitan area, *see* 826 F.2d at 77, P. App. at 88a. Instead, the proper comparison is between the DCFD's work force and its applicant pool. *See Hazelwood School District v. United States,* 433

If evidence of present discrimination will not create a factual predicate supporting affirmative action, then the decisions of this Court permitting race-conscious remedial measures are without meaning.[12] Nothing in any of the rulings of this Court requires an employer, public or private, to convict itself of liability under Title VII or the Constitution before undertaking affirmative action. The anomaly of requiring employers to remedy discrimination while denying them a reasonable means to avoid it in the first place is absurd. In fact, this Court has never accepted that an employer must choose between liability to nonminorities if it fails to prove its own discrimination, or liability to minorities after such discrimination has been proven. *See Johnson*, 107 S. Ct. at 1451, n.8; *Wygant*, 476 U.S. at 290-91 (O'Connor, J., concurring); *Weber*, 443 U.S. at 210-11 (Blackmun, J., con-

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U.S. 299, 508 n.13 (1977); *Payne v. Travenol Laboratories Inc.*, 673 F.2d 798, 823-24 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981). The court of appeals further muddied its statistical comparison by focusing only on new hires employed after 1981; however, for the years 1983 and 1984 of this comparison, the DCFD was hiring in compliance with recommendations of the OHR which were meant to correct an imbalance in the DCFD's workforce. Finally, the court of appeals ignored the readily manifest imbalance of white applicants hired shortly after passing the test and black applicants facing years of delay before hire. When proper comparisons are made which do not dilute the percentage of blacks in the appropriate labor market or applicant group, a manifest imbalance is apparent.

[12] *Cf. Johnson v. Transportation Agency, Santa Clara County, Cal.*, 107 S. Ct. 1442 (1987); *United States v. Paradise*, 107 S. Ct. 1053, 1064 (1987); *Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986); *Local 28 of the Sheet Metals Workers' Int'l Assoc. v. EEOC*, 106 S. Ct. 3019, 3049, 3052 (1986); *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

curring). The Court has also recognized that employers adopt voluntary remedial measures to avoid claims for backpay or reduce claims of disparate impact. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 589 (1984) (O'Connor, J., concurring); *Weber*, 443 U.S. 193, 211 (Blackmun, J., concurring).

Development of a valid alternative to the FST will be costly and may take years. This Court, and Respondents themselves, have recognized that validation of hiring procedures is both expensive and time-consuming. *See, e.g., Paradise*, 107 S. Ct. at 1068 n.21 (noting "how difficult it is to develop and implement selection procedures that satisfy the rigorous standards of the '*Uniform Guidelines*' because 'the validation of selection procedures is an expensive and time-consuming process usually extending over several years' ") (quoting The Brief for the United States, 24-25, n.13).[13] As noted above, unless and until a valid test is developed, the DCFD may avoid liability under Title VII through the use of an AAP or by not hiring at all. The court of appeals, however, has eliminated the first option for the DCFD. Indeed, no employer will be able to meet the requirements of the decision below for voluntary affirmative action if the virtual certainty of discrimination claims is not by itself sufficient to warrant remedial measures. To insist upon such requirements places voluntary compliance with Title VII in jeopardy. *Weber*, 443 U.S. at 210 (Blackmun, J., concurring); *Wygant*, 476 U.S. at 290-91 (O'Connor, J., concurring).

Moreover, abundant legal authority already exists which instructs employers to do exactly what the DCFD

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[13] *See also* Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. § 50.14 (1985); Rutherglen & Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 U.C.L.A. L. Rev. 467 at 508 (1988) (suggesting that the expense of validation makes affirmative action the only viable option employers have for avoiding liability for claims of disparate impact).

has attempted. *E.g., Paradise*, 107 S. Ct. 1053, 1059, (quoting *NAACP v. Allen*, 493 F.2d 614, 618 (5th Cir. 1974)) ("The . . . use of unvalidated selection procedures that disproportionately excluded blacks precluded any argument that 'quota hiring produces unconstitutional "reverse" discrimination, or a lowering of employment standards, or the appointment of less or unqualified persons.' "). Also in the more restricted context of court-ordered affirmative action, the Supreme Court has held that interim hiring or promotional goals may be *necessary*:

> pending the development of nondiscriminatory hiring or promotion procedures. In these cases, the use of numerical goals provides a compromise between two unacceptable alternatives: an outright ban on hiring and promotions, or continued use of a discriminatory selection procedure.

Sheet Metal Workers, 106 S. Ct. at 3037.

Such authority is nothing new. The EEOC Guidelines on "Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, As Amended," 29 CFR § 1608 (1987),[14] direct employers to engage in a "self analysis" to determine, *inter alia*, if there is a "reasonable basis" for concluding that employment practices "[h]ave or tend to have an adverse effect on employment opportunities of . . . groups whose employment . . . opportunities have been artificially limited." *Id.* § 1608.4(b). If so, as is the case with the DCFD, the employer may take reasonable action "includ[ing] goals and timetables . . . [and] the adoption of practices which will eliminate the actual or potential adverse impact . . . ."[15]

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[14] These guidelines were first issued in 44 Fed. Reg. 4,422 (1979).

[15] 29 CFR § 1608.4(c) (1987). These guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Local Number 93,*

Similarly, numerous court decisions have held that affirmative action is appropriate to remedy the adverse impact of an invalid hiring procedure. *See, e.g., Bushey v. New York State Civil Serv. Comm'n*, 733 F.2d 220, 226-27 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985); *Berkman v. City of New York*, 705 F.2d 584, 595-98 (2d Cir. 1983), *affirming* 536 F. Supp. 177, 216-18 (E.D.N.Y. 1982); *United States v. City of Chicago*, 663 F.2d 1354, 1361-62 (7th Cir. 1981) (en banc); *Firefighters Institute v. City of St. Louis*, 588 F.2d 235, 242 (8th Cir. 1978) ("We, therefore, direct the District Court, on remand, to enter an injunctive decree which requires that assignments to acting fire captain positions reflect a fifty percent black ratio as far as is practicable, pending the development of a valid examination."), *cert. denied*, 443 U.S. 904 (1979); *Pennsylvania v. Rizzo*, 13 Fair Empl. Prac. Cas. (BNA) 1475, 1481 (E.D. Pa. 1975), *aff'd in part, appeal dismissed in part*, 530 F.2d 501 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976); *Oburn v. Shapp*, 393 F. Supp. 561, 574-75 (E.D. Pa.), *aff'd*, 521 F.2d 142 (3d Cir. 1975), *NAACP v. Seibels*, 14 Fair Empl. Prac. Cas. (BNA) 670, 686-87 (N.D. Ala. 1977), *aff'd in part, rev'd in part*, 616 F.2d 812 (5th Cir.), *cert. denied*, 494 U.S. 1061 (1980); *see also* Uniform Guidelines on Employee Selection Procedures, 28 CFR § 50.14. It is difficult to imagine how the DCFD could not justify its AAP in view of the various authorities instructing it to correct the adverse impact of its test, including the Uniform Guidelines adopted by the Justice Department itself. Indeed, the result of the decision below would appear to be in direct conflict with the results of the authorities just cited, further warranting review by this Court.

Int'l Assoc. of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3073 (1986) (quoting *General Electric v. Gilbert*, 429 U.S. 125, 142 (1976)). *See also* 28 CFR § 50.14(6) (1987) (use of alternate selection procedures to eliminate adverse impact).

C. Because the DCFD's Plan Meets Even the Most Demanding Factual Predicate for Voluntary Affirmative Action, Additional Review is Necessary

In *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S. Ct. 1442 (1987), this Court addressed the minimum requirements under Title VII for a factual predicate supporting a public employer's voluntary affirmative action plan. *Johnson* concerned application of a county transportation agency's affirmative action plan which addressed the complete absence of female employees in 238 skilled craft worker positions. *Id.* at 1446. Unlike the DCFD, the agency had not been confronted with charges of discrimination prior to adoption of its plan, nor had the agency stipulated that it had used invalid selection procedures with a discriminatory adverse impact. The agency had not been charged with discrimination, and the record in *Johnson* did not contain prior findings of any type of discrimination, including findings of adverse impact. The facts in *Johnson* which supported affirmative action were thus less compelling than those at issue in the present case, which involves imminent discrimination with resumption of rank-ordered hiring under the FST. *See id.* at 1451-52, 1452-53 n.10.

The requirement of a "manifest imbalance" is closer to the minimum which a public employer need show for its affirmative action plan to meet the factual predicate required by Title VII.[16] As the Court reasoned in *Johnson*, citing its earlier decision in *Weber*, "an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part." *Id.* at 1451. A case like the present one exceeds the requirements of *Johnson*,

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[16] Moreover, as the strength of other evidence indicating discrimination increases, an employer need not rely as heavily, if at all, on statistical evidence in order to voluntarily adopt affirmative action. *See Johnson*, 107 S. Ct. at 1453 n.11.

since use of the invalid FST with the resulting disparate racial impact amounts to an actual violation of Title VII. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). For a court to engage in statistical comparisons concerning proof of a manifest imbalance when an ongoing disparate impact has already been established is at best an academic exercise, and at worst a waste of time for the court and the parties before it.[17]

Even under the arguably more stringent[18] factual predicate required by the Constitution, the AAP withstands scrutiny.[19] While this Court has not yet fully de-

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[17] Similarly, the focus on the DCFD's prior discrimination in the decision below was unnecessary. While *Johnson* associated the requirement of manifest imbalance with its appearance in a "traditionally segregated job category," it did so only so that "sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination." *Id.* at 1452. While much has been made below of the significance of the DCFD's historical discrimination, such historical analysis should be unnecessary in a case like the present one involving the *current* adverse impact of an invalid test. This current adverse impact demonstrates that the AAP was consistent with Title VII's purpose of eliminating discrimination. *See Sheet Metal Workers*, 106 S. Ct. at 3049 ("The purpose of affirmative action is . . . to prevent discrimination in the future.").

[18] *See Johnson*, 107 S. Ct. 1442 at 1450 n.6 ("The fact that a public employer must also satisfy the Constitution does not negate the fact that the statutory prohibition with which the employer must contend was not intended to extend as far as that of the Constitution.").

[19] Petitioners maintain that this case rests entirely on Title VII. Petition for Writ of Certiorari at 12, n.6. While this matter is open to dispute, *compare Hammon v. Barry*, 826 F.2d 73, 76 (D.C. Cir. 1987), P. App. at 80a; *with* 826 F.2d at 81-82, P. App. at 98a, 826 F.2d at 88, P. App. at 113a, *and* 813 F.2d at 420, P. App. at 17a, Petitioners and *Amici* both appear to agree that the opinions below have confused constitutional requirements with those of Title VII. The importance of these issues, the need for clarity between the two standards, and the impact this matter will have on

fined these requirements,[20] one method of meeting the constitutional predicate is with "convincing" or "sufficient" evidence of prior discrimination. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 277-78 (Powell, J., writing for the plurality) at 286 (O'Connor, J., concurring). In *Wygant*, this Court reviewed a challenge to terms in a public school district's collective bargaining agreement governing layoffs. The plurality struck down this plan in part because it was burdensome and not narrowly tailored; however, five Justices agreed that the school district had offered *no* evidence of prior discrimination.

Justice O'Connor's concurring opinion articulated what factual predicate established the constitutionally required compelling interest in race-conscious remedial action.[21] She wrote:

> The Court is in agreement that, whatever the formulation employed, *remedying past or present racial discrimination* by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. *This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination* to be accepted as legitimate *as long as the public actor has a firm basis for believing that remedial action is required.*

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interpreting constitutional requirements for affirmative action, highlight the importance of this matter and further warrant granting Petitioners' application for review.

[20] *See, e.g., Sheet Metal Workers*, 106 S. Ct. at 3052.

[21] Her concurrence has been described as "critical" to an understanding of these requirements. *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034, 1041 (7th Cir. 1984); *see also Marks v. United States*, 430 U.S. 188, 193 (1977) (when no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those who concurred on the narrowest grounds).

Id. at 286 (emphasis added). Ultimately, she wrote, nonminority challengers to an affirmative action plan bear the burden "of persuading the Court that the [public employer's] evidence did not support *an inference* of prior discrimination, and thus a remedial purpose." *Id.* at 293 (emphasis added). In other words, under the Constitution an affirmative action plan will be sustained and its factual predicate will be established where the public employer provides evidence of its reasonable belief that remedial action was needed.

These requirements could not apply more easily to the present case. The OHR had recommended that the DCFD adopt an affirmative action plan, which it did under a consent order. The discriminatory impact resulting from use of the FST, as noted above, had been established through adjudicative findings and stipulations. Federal regulations adopted by the Justice Department and the Equal Employment Opportunity Commission, as well as guidelines from federal court decisions in other jurisdictions, directed that prior to test validation, temporary affirmative action to correct precisely this kind of adverse impact was appropriate and even necessary. The DCFD had ample reaon to believe in its need to remedy discriminatory use of the FST. As a matter of simple logic, if the DCFD's voluntary plan was based on a factual predicate meeting constitutional requirements, it must have met the requirements of Title VII.[22]

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[22] In evaluating the factual predicate for affirmative action, this Court has also emphasized that preferential remedies for discrimination must not unduly trammel the interests of nonminorities. *See, e.g., Johnson*, 107 S. Ct. at 1451; *Wygant*, 476 U.S. at 282-84; *Weber*, 443 U.S. at 208. In the present case, this requirement could not be more fully met, since the DCFD's Plan does not impose *any* burden on nonminorities. The AAP merely re-orders selection to eliminate the disparate impact of rank-oredered selection from the FST. Since the FST is an invalid predictor of job performance, nonminorities cannot say that they have been deprived of anything simply because they are hired out of rank order. *See Kirkland v. New York State Dep't of Correctional Services*, 628 F.2d 796, 798

While claiming to strike the DCFD's Plan under analysis based solely on Title VII, the court of appeals applied a standard equal if not greater in strength to that required by the Constitution. Yet not all employers, including those in the private sector, are governed by constitutional standards. Accordingly, one additional consequence of the decision below is to effectively provide reverse discrimination plaintiffs with a previously unavailable and unintended cause of action. Review by this Court is therefore necessary not only to prevent confusion of the standards imposed by this Court and other authorities, but to restore the balance under Title VII of rights and remedies for minorities and nonminorities alike.

II. THE DECISION BELOW, LIMITING THE AVAILABILITY OF VOLUNTARY AFFIRMATIVE ACTION AND CONFLICTING WITH OTHER FEDERAL AUTHORITIES, WILL HAVE RAMIFICATIONS EXTENDING BEYOND THE DISTRICT OF COLUMBIA

"The question presented in this case is too important to leave in its present unsatisfactory state in this circuit

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(2d Cir. 1980) (adding points to minority scores on invalid test with adverse impact "does not bump white candidates because of their race but rather reranks their [estimated] predicted performance"), *cert. denied*, 450 U.S. 980 (1981); *United States v. City of Buffalo*, 609 F. Supp. 1252, 1254 (W.D.N.Y.) ("Since selection procedures used by the City have not yet been shown to be accurate predictors of job performance, it is, at this juncture, somewhat presumptuous to say that an injustice is done every time a candidate is selected out of rank order."), *aff'd sub nom. United States v. NAACP*, 779 F.2d 881 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 3333 (1986); *Rizzo*, 13 Fair Empl. Prac. Cas. (BNA) at 1481 ("if a person appears in a certain position on an eligibility list prepared in violation of the law, his lawful position must give way to the lawful requirement to avoid discriminatory promotions"). Perhaps most significantly, the DCFD's Plan did not address the context of layoffs, where legitimate expectations of employment have developed, but instead addressed new hires, who would not have such expectations. This distinction can be critical to evaluating the

or elsewhere." [23] So wrote five dissenting judges below, protesting the reversal of the appellate court, by a bare majority, of its decision to hear this case en banc. This reversal, however, issued with virtually no explanation, does not alter the exceptional importance of this case. As a result of the decisions below, government employers may no longer remedy the adverse impact of an invalid hiring examination. Such a result defies the rulings of this Court while placing government employers in an untenable position, forcing them to choose between liability to minorities for discrimination or liability to nonminorities for reverse discrimination. Indeed, in view of the efforts by the court of appeals to limit its ruling to Title VII, this same unaccpetable dilemma will apply equally to private employers as well.

Moreover, the majority below has created an additional dilemma for employers attempting to follow contradictory federal authorities. The federal government itself has instructed employers to adopt goals and timetables to remedy employment practices with an adverse impact on disadvantaged groups. 29 CFR § 1608.4(b) (1987). Through the Uniform Guidelines, even the Justice Department had adopted such directions. 28 CFR § 50.14 (1987). Numerous federal courts, including courts of appeals, have accepted the use of affirmative action to remedy the discriminatory impact of invalid tests.[24] In contrast, the Court of Appeals for the District

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burden of affirmative action on nonminorities. *See Wygant*, 476 U.S. at 282.

[23] Supplemental Brief in Support of Petition for Certiorari, Appendix at 3a.

[24] *See Berkman v. City of New York*, 580 F. Supp. 226 (E.D.N.Y. 1983), *aff'd without op.*, 755 F.2d 913 (2d Cir. 1985); *Guardians Ass'n of the N.Y. Police Dep't v. Civil Serv. Comm'n*, 630 F.2d 79, 108-09 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); *Berkman v. City of New York*, 536 F. Supp. 177, 216 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 584 (2d Cir. 1983); *Oburn v. Shapp*, 393 F. Supp. 561, 574 (E.D. Pa.), *aff'd*, 521 F.2d 142 (3d Cir. 1975); *Pennsylvania v. O'Neill*, 348 F. Supp. 1084, 1103-04 (E.D. Pa. 1972), *aff'd in*

of Columbia Circuit now stands alone in its failure to recognize the need to correct imminent discrimination from use of a test with a discriminatory impact through the use of a temporary affirmative action plan.

Employers hiring nationwide will be especially burdened by such conflicting messages. For example, Title VII now applies with equal force to federal employers.[25] As federal employers in the District of Columbia attempt to develop policies in compliance with the paradoxical mandates of the decisions below, it stands to reason that such policies may take effect throughout the country in regional offices of federal agencies.[26] Without the inter-

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part, vacated in part, 473 F.2d 1029 (3d Cir. 1973) (en banc) (per curiam) (proportional hiring provision affirmed by equally divided court); *Vulcan Soc'y v. City of New York*, 96 F.R.D. 626, 628-29 (S.D.N.Y. 1983); *Reed v. Lucas*, 11 Fair Empl. Prac. Cas. (BNA) 153, 155-56 (E.D. Mich. 1975); *NAACP v. Seibels*, 14 Fair Empl. Prac. Cas (BNA) 670, 686-87 (N.D. Ala. 1977), *aff'd in part, rev'd in part*, 616 F.2d 812 (5th Cir.), *cert. denied*, 449 U.S. 1061 (1980); *Pennsylvania v. Rizzo*, 13 Fair Empl. Prac. Cas. (BNA) 1475, 1481 (E.D. Pa. 1974), *aff'd in part, appeal dismissed in part*, 530 F.2d 501 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976). For public agencies such as police or fire departments, the ability to hire is often vital to public safety, and courts have recognized this concern, which is of no less importance in the present case, in upholding affirmative action plans. *See Berkman v. City of New York*, 536 F. Supp. 177, 216 (E.D.N.Y. 1982) ("to freeze all appointments [to the Fire Department] may present a hazardous situation to the citizens of the community") (quoting *Vulcan Soc'y v. Civil Serv. Comm'n*, 360 F. Supp. 1265, 1278 (S.D.N.Y.)), *aff'd in part*, 490 F.2d 387 (2d Cir. 1973)), *aff'd*, 705 F.2d 584 (2d Cir. 1983); *Reed*, 11 Fair Empl. Prac. Cas. (BNA) at 155 ("Any injunction which caused continuing vacancies in the . . . [Sheriff's] Department would jeopardize . . . efficient operation.").

[25] *See* 42 U.S.C. § 2000e-16 (1982).

[26] While the District of Columbia is the center of the federal government, and the source of many agency-wide policies, the entire Washington Metropolitan area contains only the second largest number of federal civilian employees. California ranks first as

vention of this Court, the conflicts described above will only grow more burdensome for federal or similarly situated private employers where other jurisdictions are more lenient in their requirements for affirmative action. Should other jurisdictions follow the court below, however, the ability for all employers to remedy discrimination will only suffer more consistent impairment.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: May 6, 1988

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the jurisdiction with the highest number of such employees. *See* United States Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1987*, at 310; United States Office of Personnel Management, *Federal Civilian Workforce Statistics, Biennial Report of Employment by Geographic Area* 4-5 (Dec. 31, 1986).

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0903

MARVIN K. HAMMON, *et al.*,
Plaintiffs,

v.

MARION S. BARRY, JR., *et al.*,
Defendants.

Civil Action No. 85-0782

KEVIN MICHAEL BYRNE, *et al.*,
Plaintiffs,

v.

THEODORE R. COLEMAN, *et al.*,
Defendants.

Civil Action No. 85-0797

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

STATEMENT OF STIPULATED MATERIAL FACTS

* * * *

16. Components of the 1984 test were substantially the same as the corresponding components of the 1980 test; but one component, following oral directions, was revised and substantially modified.

17. Both the 1980 test and the 1984 test had an adverse impact upon Black applicants as more fully described below.

The 1980 Examination

18. After an evidentiary hearing, the Hearing Examiner found that the entry level examination administered on November 22, 1980 had an adverse impact upon Black applicants and was not a valid predictor of successful job performance as required by the Uniform Guidelines on Employee Selection Procedures.

19. There were 974 test takers, of whom 724 (74.35%) were Black and 207 (21.5%) were White. There were 959 passers, of whom 713 (74.35%) were Black and 205 (21.5%) were White.

20. The hearing examiner's finding of adverse impact is based upon the rank order use of the examination, because such use resulted in a substantially different rate of selection of Black and White applicants.

21. The hearing examiner found that if selections were made in rank order the following would have resulted:

for the first 100 names on the eligible list the selection rate for Blacks would be 3.6% and for Whites 34%;

for the first 200 names on the eligible list the selection rate for Blacks would be 11.2% and for Whites 54%;

for the first 300 names on the eligible list the selection rate for Blacks would be 20.8% and for Whites 69.4%.

22. The District of Columbia accepted these and other findings of the Hearing Examiner concerning adverse

impact and job relatedness, and does not now contend that the written examination either had no adverse impact or is valid and job related.

The 1984 Examination

23. The 1984 firefighters examination was administered in March, April and July 1984.

24. There were 1,626 test takers, of whom 1,050 (64.6%) were Black, 492 (30.3%) were White and 84 (5.1%) Hispanic and others; 1,384 persons passed the exam, of whom 830 (60%) were Black, 486 (35.1%) were White, 33 (2.4%) were Hispanic and 35 (2.5%) were others, 1287 (93%) were males and 96 (6.9%) were female.

* * * *

29. The District of Columbia has agreed to validate the examination in accordance with the May 23, 1984 consent decree in the *Hammon* case but, to date, has not done so. In particular, neither the District of Columbia nor any other party to these consolidated cases has developed validity evidence meeting the standards of the psychological profession showing that those who score higher on the test are more likely to perform better on the job than those who score lower.

Proposed Selection Procedures From the 1984 Eligibility List Using the District of Columbia Affirmative Action Plan

30. The AAP requires the use of multiple certificates to select firefighters and is designed solely to eliminate the racial and sexual disparity which would exist if the examination results were used in rank order.

31. Under the Plan, the District of Columbia Office of Personnel is to generate 12 certificates, each consisting of approximately 120 candidates, from separate lists of White males, White females, Black males, Black fe-

males, Hispanic males, and other males based upon the candidate's score on the written examination (plus veteran's preference points).

32. Each certificate, described in paragraph 31 above, is to have the following racial and sexual proportion of candidates: 60% Black, 2.4% Hispanic, 35.1% White, 2.6% other, 93% male, and 7% female.

* * * *

DATED: March 14, 1985

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0903

MARVIN K. HAMMON, *et al.*,
Plaintiffs,

vs.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

Civil Action No. 85-0782

KEVIN MICHAEL BYRNE, *et al.*,
Plaintiffs,

vs.

THEODORE R. COLEMAN, *et al.*,
Defendants.

Civil Action No. 85-0797

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE DISTRICT OF COLUMBIA, *et al.*,
Defendants.

Courtroom No. 11
Washington, D.C.

Saturday, March 23, 1985

The above-entitled matter came on for hearing in open court on Cross-Motions for Summary Judgment before The Honorable CHARLES R. RICHEY, United States District Judge, commencing at 10:13 a.m.

* * * *

[103] Now, maybe they haven't sufficiently thought through their approach, but there's—I think there's a serious Article III question, frankly, whether the Justice Department's challenge on the hiring test can properly be before the Court, but I have to go through the process one at a time.

On the factual question, to set the predicate for this, the Department of Justice reply memorandum says at page 7, note 3, that there's no need for concern over hiring, because, since 1981, 66 percent of the hires have been black; since 1982, 73 percent of the hires have been black.

What they overlook is, first, that there was adverse impact on those who never got hired. Our figure there is 2.67 standard deviations away from what you would expect by chance, and I'll supply those figures to the Court, also.

Second, they overlook the fact that the black candidates by and large had to wait years before they got hired. Those who were—of all the whites who were hired, 29 percent were hired in the same year they took the test, within one year; one percent of blacks, a 29-fold difference in the percentage of those who were hired the same year.

Among those who had to wait two or three years after [104] they took the test to be hired; that's true of 25 percent of the whites who ultimately got hired; it's true of 48 percent of the blacks who ultimately got hired.

Now, Justice says again, this is no problem, having to wait to be hired. Put aside the fact that the Byrne plaintiffs include some people who have apparently just a couple of months of delay in reaching their promotional ranks, and that's enough for them to be here in court, it's enough for the Justice Department to come in to champion their interests, but the years of delay for blacks are no problem, says the Justice Department, because everyone got retroactive seniority dates, so that anybody who did get hired from the 1980 test—put aside

the people who never got hired—but those who did get hired have the same seniority date.

What about back pay? Years' worth of loss of earnings is a fairly significant problem, and the hearing examiner's recommendation makes clear—this is on page 93, the asterisked footnote at the bottom of the page—that the retroactive seniority date has no connection with back pay, nobody is receiving any back pay, so there is a major problem there that Justice did not see fit to get involved in.

THE COURT: Well, maybe they'd like to ask the Congress of the United States to raise the federal payment, so that Ms. Reid and her colleagues, Mr. Reid and Mr. Suda and Mr. Grossman and the others, can pay these people their back [105] pay and front pay.

MR. SEYMOUR: But it is against the background—

THE COURT: I don't want the taxpayers to have to do it.

MR. SEYMOUR: It is against this background of a clear violation of Title VII on the 1980 test that what the District is proposing to do on the 1984 test has to be weighed.

The Justice Department's own regulations allow the District a choice. They don't mention this in their papers, but they allow the District a choice. You can either validate and show it's valid, or you can come up with some change in the selection procedures that is guaranteed to eliminate the adverse impact. In the additional citations of authority we've provided today, we've provided copies of the questions and answers to clarify the uniform guidelines, and of the uinform guidelines provision that make that clear.

* * * *